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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 665

ALEX SCHOLDER, et al., Petitioners

v.

UNITED STATES OF AMERICA, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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The respondents, in their opposing brief in No. 665, do not respond to any of the points raised by the petitioners with respect to sovereign immunity and the Administrative Procedure Act. They prefer instead to argue that petitioners' contentions were "neither presented to, nor passed on by, either court below," thereby presumably impugning the ripeness of this question. Factually, respondents are manifestly mistaken. The Administrative Procedure Act has been before the

courts from the inception of this litigation.[1] Moreover, the history of this litigation and its treatment by both courts below illustrates the critical need for this Court to lay down guidelines for the lower courts in handling A.P.A. cases.

Paragraph 20 of the Amended Complaint alleges, inter alia, that the action is "for judicial review of agency action pursuant to 5 U.S.C. Chapter 7." The Sixth and Ninth Claims charge that the challenged agency action is "arbitrary, capricious and constitutes an abuse of discretion." Title 5 U.S.C. §§ 702, 705 and 706 were cited in the Memorandum of Points and Authorities filed with the Complaint. The government defendants brought a Motion to Dismiss in which they argued, inter alia, that the suit was barred by sovereign immunity. In their Points and Authorities in Opposition to the government's Motion to Dismiss, the Indian plaintiffs specifically argued

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[1]Of course, this Court may consider issues of law that are raised for the first time. Kiefer-Stewart Co. v. Seagram, 340 U.S. 211 (1951) at 214. Since the sovereign immunity question at issue here was expressly considered and passed on recently by the Ninth Circuit in State of Washington v. Udall, 417 F.2d 1310 (9th Cir. 1969), and has been passed on by other courts of appeal and is now clearly at the heart of the present controversy, the government's contention borders on the frivolous.

that "sovereign immunity is waived by the Administrative Procedure Act," and cited Mulry v. Driver, 366 F.2d 544 (9th Cir. 1966); Estrada v. Ahrens, 296 F.2d 690 (5th Cir. 1961); Adams v. Witmer, 271 F.2d 29 (9th Cir. 1959); and Homovich v. Chapman, 191 F.2d 761 (D.C. 1951).

The district court elected to treat the government's Motion to Dismiss for failure to state a claim as a motion for summary judgment as permitted by Rule 12 of the Federal Rules of Civil Procedure. Scholder v. United States, 298 F.Supp. 1282 (S.D. Cal. 1969), at 1285, Pet. App. C 4. Although the district court therefore purported to reach "the merits" of the controversy, and referred in its opinion to plaintiffs' allegation that the challenged agency action constitutes an abuse of discretion, 298 F.Supp. at 1286, Pet. App. C 7, careful examination of the court's opinion discloses that its decision was founded on the alleged failure of Congress to express by relevant statute a specific intention not to benefit non-Indians. See especially 298 F.Supp. at 1287, Pet. App. C 9. Thus, the court did not distinguish between the plaintiffs' position respecting the interpretation of the appropriation statutes and plaintiffs' arguments that the challenged agency action in the circumstances presented by the case at bar is arbitrary and capricious and constitutes an abuse of discretion. No mention was made of the government's sovereign immunity contention.

Sovereign immunity and the Administrative Procedure Act did not play a prominent role at the appellate level for two reasons. First, although the issue was raised and argued in the district court, it was not discussed in the opinion. Second, the Ninth Circuit had recently gone out of its way in dicta in State of Washington v. Udall, supra, to reject the view that the Act constituted a limited waiver of sovereign immunity. However, plaintiffs did carefully distinguish between their statutory interpretation and abuse of discretion claims.

The opinion of the court of appeals, like that of the district court, refers to plaintiffs' contention that the challenged agency action constitutes an abuse of discretion, but also fails to meet this issue on the merits. In the case of the court of appeals, this failure is clearly ascribable to its holding that "sovereign immunity shields the decision [of the Bureau of Indian Affairs] from judicial scrutiny," Pet. App. B 11, and its reliance on State of Washington v. Udall, supra, at the critical juncture. Pet. App. B 5, Thus, the issue that is squarely presented to this Court is whether, as a matter of law, sovereign immunity is a bar to the abuse of discretion claim. The question could not be more ripe.

As illustrated by both opinions below, a court's approach to the issue of sovereign immunity will determine its treatment of the merits. If, in order to reach the merits, a court is convinced

it must find either an ultra vires or unconstitutional action, it will tend to look for a specific statutory or constitutional prohibition. Tooahnippah v. Hickel, 397 U.S. 598 (1970), discussed in Part I of the Reasons for Granting the Writ in the Petition, exemplifies the opposite and more appropriate inquiry. There, this Court refrained from abstract statutory interpretation in favor of assessing the challenged agency action in light of the circumstances presented by the case and the limits on agency discretion to be implied from relevant statutes and policies. This Court should exercise its plenary jurisdiction not only to resolve the conflict among the courts of appeal on the sovereign immunity question, but also to lay down authoritative guidelines for the proper handling of the merits of A.P.A. cases.

The record and posture of this litigation manufactured in the Brief for the Respondents in Opposition bears no relationship to the actual history of this case. In light of the inability of the government to face the issues presented in the Petition without grossly distorting the record, the need for review of the action below is indisputable.

Dated: October 29, 1970

Respectfully submitted,

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